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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 383

UNITED STATES OF AMERICA,

Petitioner,

vs.

COMPANHIA ATLANTICA DE DESENVOLVIMENTO E EXPLORAÇÃO DE MINAS,

Respondent.

ON CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

RESPONDENT'S BRIEF IN OPPOSITION

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Opinion Below

The opinion of the Court of Claims (Pet. App.[1] 17-26) is reported at 180 F. Supp. 342.

Jurisdiction

The judgment of the Court of Claims was entered on January 20, 1960. Respondent's motion for rehearing was denied on April 6, 1960. On July 2, 1960, the time for filing a cross-petition for a writ of certiorari was extended

[1] "Pet. App." refers to the petition in No. 209, this Term, in which the opinion below is set forth.

by Mr. Chief Justice WARREN to and including September 3, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

Question Presented

Whether the Court of Claims properly held that respondent's bona fide employment of two exclusive sales agents, under a contingent compensation agreement which was disclosed to petitioner at the outset of negotiations, did not justify petitioner's cancellation on other grounds of its procurement contract with respondent.

Contract Provision Involved

> ARTICLE XVII. CONTINGENT FEES. The Contractor warrants that no person or selling agency has been employed or retained to solicit or secure this Contract upon an agreement or undertaking for a commission, percentage, brokerage, or contingent fee, excepting bona fide employees or bona fide established commercial or selling agencies maintained by the Contractor for the purpose of securing business. For breach or violation of this warranty, the Government shall have the right to annul this Contract without liability or in its discretion to deduct from the contract price or consideration the full amount of such commission, percentage, brokerage or contingent fee.

Statement

Respondent brought this action for breach of its long-term contract to sell tungsten to the United States. Petitioner had cancelled the contract on the ground that respondent had violated Article XX (d) thereof. It defended the action on the additional grounds, not stated at the time of cancellation, of inability to perform and violation of Article XVII, the contingent fee warranty

clause of the contract. The Court of Claims gave judgment for respondent after finding that the stated ground for cancellation was non-existent and the other grounds were without merit.

The principal facts concerning the negotiation and execution of the contract are set forth in respondent's petition in No. 209, this Term, which seeks review of the measure of damages applied by the court. This conditional cross-petition is limited to an attack on the court's decision that the defense founded on alleged violation of the contingent fee warranty clause was without merit. Only a few additional facts need to be stated.

The arrangement which petitioner claims to be in violation of the contingent fee clause is expressed in a written agreement dated August 22, 1951, between respondent and Colonel Lawrence Westbrook and Heinz Pulvermann, who were thereby appointed exclusive sales agents and industrial consultants to respondent (50(b)).[1] A copy of this agreement was attached to the first offer made by respondent to petitioner on October 16, 1951, reviewed with the Government contracting officer, Captain Maull, and retained in the petitioner's files (5(b), 57 (d)). At no time during the subsequent negotiations did any Government representative object to respondent's commission arrangement with Westbrook and Pulvermann.

The Trial Commissioner and the Court of Claims have found that the compensation agreement was made in good faith on both sides to provide mutually acceptable incentives for participation by Westbrook and Pulvermann as coventurers in respondent's enterprise; that it contemplated the performance of substantial services, which were in fact rendered, as *quid pro quo* for the contingent fee; that both men had unusual qualifications and experience for the work which they undertook; that, while Colonel West-

[1] Figures in parentheses refer to the findings of the Court of Claims.

brook used his experience in Government to open doors, his advocacy was rested on the merits of the case; and that Westbrook and Pulvermann were bona fide employees or selling agencies excepted from the warranty (136, 137; Pet. App. 22-23).

Argument

Petitioner in effect is asking this Court to redetermine the facts as found by the Trial Commissioner and adopted by the Court of Claims. Petitioner's reliance on the regulations issued by the General Services Administration, 44 C.F.R. §150, is misplaced. We agree with petitioner that these regulations correctly set forth the controlling criteria for interpreting the warranty clause. It is precisely these criteria, however, which the court's findings demonstrate have been met. We invite particular attention to the stated objective of the warranty:

> "• • • The prevention of improper influence in connection with the obtaining of Government contracts, the elimination of arrangements which encourage the payment of inequitable and exorbitant fees bearing no reasonable relationship to the services actually performed and the prevention of unwarranted expenditure of public funds which inevitably results therefrom." (§150.3)

The Court has been most emphatic in its findings of complete good faith and absence of all impropriety in the contingent fee arrangement belatedly attacked by petitioner. Moreover, the GSA regulations explicitly recognize that the factors to be used in testing whether or not an arrangement complies with the warranty are to be used as guides to judgment, and that no single factor is determinative in itself:

> "They [the factors] are necessarily incapable of exact measurement or precise definition and it is

> neither possible or desirable to prescribe the relative weight to be given any single factor as against any other factor or as against all other factors. The conclusions to be reached in a given case will necessarily depend upon a careful evaluation of the agreement and other attendant facts and circumstances." (§150.5(c)(2))

It is just such a "careful evaluation of the agreement and other attendant facts and circumstances" that the commissioner and the court have made. This is their proper function; it does not appear that they have discharged it incorrectly.

Petitioner urges, however, that the warranty clause "reflects a firmly rooted principle of public policy which condemns the tendency of [contingent fee] agreements toward improper solicitation of and pressure on public officers, even though in a particular case it may be impossible to establish that improper means were, in fact, contemplated or used" (Pet. 7). For this proposition it cites *Tool Co.* v. *Norris*, decided by this Court in 1851, more than 50 years before the introduction of the standard contingent fee warranty clause into Government contracts. It would seem that petitioner ought not to be able to rely both on *Tool Co.* and on the GSA regulations, for they are in conflict. In any event, the administrative and legislative history of the warranty clause, discussed by the Court of Claims in its opinion (Pet. App. 23-24), establish that the warranty clause was not intended to forbid customary and honest business practices in dealing with the Government (cf. Finding 135).

Even if it should be concluded that respondent had committed some technical violation of the clause, this would not, as petitioner asserts (Pet. 7), give it a complete defense to respondent's action. The Court of Claims has found that the Government's negotiating officials, to whom

the contingent fee agreement was disclosed when negotiations began, must have "then and there" decided that the arrangement did not violate the warranty. It held that in these circumstances, the Government should not be permitted (short of a showing that evils were present) "to awaken such a 'sleeper'" to justify its cancellation of a contract which it purported to cancel on another ground which it cannot now defend (Pet. App. 24-25). Defendant is therefore precluded from asserting violation of the warranty as a defense. Cf. *Service* v. *Dulles*, 354 U. S. 363, 372 (1957); *David J. Joseph Co.* v. *United States*, 113 Ct. Cl. 3, 82 F. Supp. 345 (1949).

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the conditional cross-petition for a writ of certiorari should be denied.

Respectfully submitted,

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As required by GSA regulations, 44 CFR §§1506.1-1013